

EUGENE BURGER, et al, No C 02-2309 VRW
Plaintiffs, ORDER
v
MICHAEL KUIMELIS, et al,
Defendants.

MICHAEL KUIMELIS, et al,
Counterclaimants,
v
EUGENE BURGER, et al,
Counterdefendants.

Currently before the court is yet another round of motions in this case seeking various forms of relief. The court has set a schedule for dispositive motions, pretrial including motions in limine and trial. A resolution is in sight.

In this latest cycle of motions, the Burger parties move

1 to dismiss portions of Kuimelis' sixth amended counterclaim
2 ("SACC"). Doc #373 (SACC); Doc #410 (Mot Dismiss SACC).
3 Additionally, the Burger parties move to dismiss Acordia's
4 counterclaim ("ACC"). Doc #371 (ACC); Doc #412 (Mot Dismiss ACC).
5 Kuimelis also moves to disqualify one of the Burger parties'
6 counsel, Daniel B Beck of the Beck Law Offices. Doc #346 (Mot
7 Disq). Next, Kuimelis seeks to intervene as an individual limited
8 partner of plaintiff Via Hidalgo Associates. Doc #345 (Mot Intv).
9 Finally, the Burger parties move pursuant to FRCP 21 the court for
10 an order dropping Apollo as a plaintiff. Doc #436 (Mot Drop).

11 The parties and the court are familiar with the facts of
12 this case so the court will not burden this order with an
13 unnecessary factual recitation.

14 II

15 *Motion to Dismiss Kuimelis' SACC*

16 On June 28, 2004, the court addressed the Burger parties'
17 motion to dismiss Kuimelis' fifth amended counterclaim (FACC). Doc
18 #368 (Order). The court denied the motion to dismiss as to all
19 claims in the FACC save five: (1) claims one through three brought
20 pursuant to 18 USC § 1962 ("RICO"), (2) claim seven brought
21 pursuant to Cal Bus & Prof Code § 17200 inasmuch as it was based on
22 events occurring before October 13, 1995, and (3) claim ten for
23 recovery under an implied contractual indemnity theory. Id at 20,
24 40, 42.

25 As to the three RICO counts, the court concluded that
26 Kuimelis had simply failed to plead adequately the damages being
27 sought. Id at 14 (holding that the "conclusory allegations in the
28

1 FACC" regarding RICO damages "did not suffice to withstand a motion
2 to dismiss under FRCP 12(b)(6)."). As to claim seven, the court
3 concluded that any claims which accrued prior to October 13, 1995,
4 were time-barred and Kuimelis had failed to plead any fraudulent
5 affirmative actions taken by the Burger parties sufficient to toll
6 the statute of limitations. Id at 39. As to claim ten, the court
7 held that Kuimelis had failed to "frame the implied contractual
8 indemnity claim as one for declaratory relief." Id at 42. All of
9 the dismissals were without prejudice and Kuimelis was given leave
10 to amend to remedy the deficiencies. Id.

11 Kuimelis filed the SACC on July 14, 2004. The SACC was
12 essentially a carbon copy of the FACC save a few additional
13 paragraphs specifically addressing the deficiencies enunciated
14 above. Nevertheless, the Burger parties have filed a new motion to
15 dismiss the entire SACC (Doc #460), rehashing and duplicating the
16 vast majority of the first motion to dismiss. The Burger parties
17 state that they "re-raised" these previously argued grounds for
18 dismissal "properly [to] preserve" these rejected grounds on
19 appeal. Doc #460 at 1. There is no need to waste time figuring
20 out the Burger parties' motives; the rejected grounds are
21 preserved. The court will instead focus on the Burger parties' new
22 grounds for dismissal.

23 It should be noted that the SACC, in realleging the
24 seventh cause action for unfair business practices, limits this
25 claim to practices that occurred "from October 13, 1995, to October
26 13, 1999." SACC at 37, ¶134. Because these claims are not time-
27 barred, the Burger parties do not raise any new grounds for
28 dismissal of the SACC's seventh cause of action. Nor do the Burger

1 parties challenge the sufficiency of the tenth cause of action as
2 pled in the SACC. Instead, the Burger parties limit their new
3 dismissal arguments to the RICO claims, as well as the eleventh
4 cause of action for money had and received.

5
6 A

7 To remedy the inadequate pleading of damages found in
8 claims one through three brought pursuant to RICO, the SACC states
9 that Kuimelis has suffered

10 concrete financial loss includ[ing], without
11 limitation, [1] attorney's fees and other expenses
12 incurred by [Kuimelis] arising from the HUD
13 investigation and subsequent criminal trial of Burger,
14 [2] damage to his business reputation directly
15 resulting from [Burger]'s targeting and use of
[Kuimelis'] reputation to carry out the fraudulent
conduct, and/or [3] lost business income and
opportunities that [Kuimelis] would otherwise have
realized in the absence of [Burger]'s unlawful conduct.
SACC at 27, ¶93.

16 The Burger parties do not take issue with the "lost business
17 income" injury allegations. They do, however, attack the other two
18 alleged RICO injuries.

19 The Burger parties first argue that Kuimelis has not pled
20 a cognizable RICO injury for attorney's fees arising from the HUD
21 investigation and Burger trial. Attorney's fees are special
22 damages that must be pled with specificity pursuant to FRCP 9(g)
23 and, according to the Burger parties, Kuimelis has failed to meet
24 this specificity requirement. Doc #410 at 10-11. Specifically,
25 the Burger parties argue that Kuimelis is required to plead "the
26 special circumstances or specific facts giving rise to the special
27 damages, the specific type of damages [and] the amount of such
28 special damages." Id at 11. The Burger parties misunderstand the

1 requirements of FRCP 9(g).

2 "Special damages are those that, although resulting from
3 the commission of the wrong, are unusual for the claim in question
4 and not normally associated with the claim." James W Moore, 2
5 Moore's Federal Practice § 9.08(1)(a) (Bender & Co 3d ed 2000).

6 "The goal of Rule 9(g) is to inform defending parties of the nature
7 of the damages claimed in order to avoid surprise and to inform the
8 court of the substance of the complaint." NTBS Storage &
9 Retrieval, Inc v Kardex Systems, Inc, 2001 US Dist LEXIS 24605, *6
10 (ND Tex 2001) (citing Great American Indemnity Co v Brown, 307 F2d
11 306, 308 (5th Cir 1962) (emphasis in original)). Essentially,
12 "[a]llegations of special damage must be sufficient to permit a
13 defending party to begin preparing a defense." Moore, Moore's
14 Federal Practice at § 9.08(b).

15 Assuming arguendo that the attorney's fees in this case
16 can be characterized as "special damages" for the purposes of Rule
17 9(g), the court concludes that the requirements of the rule have
18 been satisfied. The SACC informs the Burger parties of (1) the
19 nature of the damages, (2) how the damages were incurred and (3)
20 the period when they were incurred. Such allegations clearly
21 apprise the Burger parties of the "nature" of damages Kuimelis
22 seeks and permits them to begin preparing a defense.

23 Next, the Burger parties argue that "damage[] to business
24 reputation injury is not a cognizable injury under RICO." Doc #410
25 at 13. Kuimelis disagrees, stating that "courts have reached the
26 opposite conclusion" regarding injury to business reputation. Doc
27 #438 at 10. The "courts" referenced by Kuimelis include the Fifth
28 Circuit and the United States District Court for the District of

1 South Carolina. See Khurana v Innovative Health Care Systems, Inc,
 2 130 F3d 143 (5th Cir 1997), rev'd on other grounds, Teel v Khurana,
 3 529 US 494 (1998); Sadighi v Daghighfekr, 36 F Supp 2d 279 (D SC
 4 1999). Unfortunately for Kuimelis, courts in this circuit support
 5 the Burger parties' legal assertion. See Oscar v University
 6 Students Co-op Ass'n, 965 F2d 783 (9th Cir 1992) (en banc); see
 7 also In re Teledyne Defense Contracting Derivative Litigation, 849
 8 F Supp 1369, 1372n1 (CD Cal 1993).

9 In Oscar, the Ninth Circuit held that injuries to
 10 business or property are not actionable under RICO unless they
 11 result in "tangible financial loss." Oscar, 965 F2d at 785.
 12 Future financial loss, future loss of enjoyment of property and
 13 peace of mind, while no doubt injuries, are, according to the Ninth
 14 Circuit, "valuable intangible interests," and "precisely the sort
 15 of speculative future injury which RICO disdains." Id at 787
 16 (citing Hecht v Commerce Clearing House, 897 F2d 21, 24 (2d Cir
 17 1990) (emphasis added)). The Ninth Circuit made clear, however,
 18 that it was not denigrating the severity of injury to these
 19 intangible interests and reiterated that a injured party "can
 20 recover for such injuries under a myriad of state law causes of
 21 action." Id. The party, however, "cannot do so under RICO." Id.

22 One year after Oscar was decided, Judge David Kenyon of
 23 the Central District of California faced the question presently
 24 before the court: Is harm to business reputation a cognizable
 25 injury under RICO? Teledyne, 849 F Supp at 1372n1. In Teledyne,
 26 shareholders of Teledyne, Inc (Teledyne) brought a derivative suit
 27 against the board of directors, as well as certain present and
 28 former officers alleging a pattern of criminal and otherwise

1 fraudulent conduct. Id at 1370. Plaintiffs purported to state
2 claims under all four RICO provisions, alleging, among other
3 injuries, that Teledyne had suffered injury to its "business
4 reputation." Id at 1372n1. In analyzing defendants' Rule 12(b)(6)
5 motion, Judge Keynon held that injury to business reputation was
6 not a cognizable injury because "injury to such an intangible
7 property interest is not cognizable under RICO in the circuit." Id
8 (citing Oscar, 965 F2d at 785).

9 The court agrees with Judge Keynon that Oscar forecloses
10 a party from pleading a RICO injury based upon injury to business
11 reputation. Injury to an intangible interest such as business
12 reputation is simply too speculative under Oscar. While Kuimelis
13 is correct that other courts have come out differently on the
14 issue, this court is bound by Ninth Circuit pronouncements.

15 Because counts one through three state two cognizable
16 RICO injuries, the court will simply STRIKE the portions of counts
17 one through three that allege injury to business reputation. With
18 these three provisions stricken, counts one through three state a
19 claim under RICO and thus the Burger parties' motion to dismiss
20 counts one through three of the SACC is DENIED.

21
22 B

23 Finally, the Burger defendants request the court,
24 pursuant to FRCP 12(e), to order Kuimelis to provide a more
25 definite statement pertaining to the eleventh cause of action in
26 the SACC, a claim for money had and received. Doc #460 at 11.
27 Specifically, the Burger parties assert that because the eleventh
28 cause of action is premised on Kuimelis' "mistake" in over-

1 requirements of Rule 9(b). Next, they claim the alleged damages
2 flowing from the fraud are "special damages" and Acordia has not
3 met the heightened pleading requirements of Rule 9(g). The Burger
4 parties' arguments fail to persuade.

5 The goal of Rule 9(b) is to give defendants notice of the
6 particular conduct alleged to be fraudulent so that they can defend
7 against the charge. Semegen v Weidner, 780 F2d 727, 731 (9th Cir
8 1985). In addition to the usual "who and when" specifics, in
9 "cases concerning * * * omission of facts, Rule 9(b) typically
10 requires the plaintiff to plead the type of facts omitted, where
11 the omitted facts should have been stated and the way in which the
12 omitted facts made the representations misleading." Moore, Moore's
13 Federal Practice at § 9.03(b). The ACC meets these requirements in
14 abundance. The ACC pleads the parties to the fraud (Kuimelis and
15 Burger parties), the time period of the fraud and the type of facts
16 omitted by the Burger parties (i e, that they were helping Kuimelis
17 misappropriate monies due to Acordia). Moreover, the ACC asserts
18 that if the Burger parties had informed Acordia of these omissions,
19 it would have taken action against Kuimelis and the Burger parties.
20 These allegations are more than sufficient to allow the Burger
21 parties (who are all intimately familiar with the events
22 surrounding this cause of action) to answer and prepare a defense
23 against these allegations of fraud.

24 Next, the Burger parties assert that the fraud damages
25 alleged in the ACC, namely the legal costs associated with
26 defending Acordia during (1) the HUD investigation and (2) the
27 indemnity claims brought by Kuimelis, are "special damages" and
28 have not been pled with the required specificity of Rule 9(g). The

1 court rejects this argument under the same legal reasoning employed
2 in rejecting the Rule 9(g) argument offered by the Burger parties
3 in relation to Kuimelis' SACC. See *supra* Part II(A).

4 Also relating to damages, the Burger parties argue that
5 the ACC fraud claim must be dismissed because "it fails to allege a
6 definite amount of damages" as required by California law. This
7 argument is unavailing, for, as stated above, California pleading
8 law does not govern this case; federal law governs. *Hanna*, 380 US
9 460. The Burger parties offer no federal case law requiring a
10 party to allege a definite amount of damages.

11
12 B

13 Next, the Burger parties move to dismiss Acordia's second
14 cause of action, which seeks recovery under an implied contractual
15 indemnity theory. Doc #412 at 15. Specifically, the Burger
16 parties argue that this claim must be dismissed because it has not
17 yet accrued. *Id* ("An indemnity claim does not accrue until after
18 the alleged indemnitee suffers a loss through a payment of a
19 judgment or settlement debt.") (quoting *Smith v Parks Manor*, 197
20 Cal App 3d 872, 882 (1988) (emphasis in original)). The Burger
21 parties, however, overlook the fact that Acordia has framed the
22 implied contractual indemnity claim as one for declaratory relief.
23 See ACC at 12-13 ("Declaratory Relief/Equitable Indemnity"). As
24 the court stated in its June 28, 2004, order regarding Kuimelis'
25 claim for implied contractual indemnity: "[A]n indemnity claim may
26 be brought as a declaratory action in conjunction with the
27 principal action." Doc #368 at 41 (citing *Allen v Southland*
28 *Plumbing, Inc*, 201 Cal App 3d 60, 65 (1988)).

Accordingly, the motion to dismiss Acordia's second cause of action is DENIED. Nor is it appropriate to require Acordia to provide a more definite statement; the allegations surrounding this claim are sufficient and far from "vague and conclusory," as the Burger parties contend. Doc #412 at 16.

IV

Motion to Intervene

One of the 72 property owners named as a plaintiff in the FAC is Via Hildago Associates (VHA), a limited partnership that was allegedly overcharged by Kuimelis. Fittingly, given the tangled web this case presents, Kuimelis is a limited partner in VHA and, in one more twist, EBMC is the general partner in VHA.

Five months after the FAC was filed and almost three months after discovery had closed, Kuimelis filed a Rule 24 motion to intervene as a limited partner of VHA to bring a derivative suit "assert[ing] claims on behalf of [VHA] that are not currently being pursued by it." Doc #345 at 5. Specifically, Kuimelis claims that VHA has a cause of action against EBMC (as a property manager of VHA's property) because EBMC "converted monies (in the form of premium returns and surcharges) from" VHA. Id at 2. Additionally, Kuimelis' derivative suit will bring claims against EBMC (as the general partner of EBMC) for "breach of the duty of care and fiduciary duty of the general partner, among other torts." Doc #462 at 8. Whatever the merits of this derivative suit, Kuimelis cannot intervene to bring such a suit in this action.

The Ninth Circuit has adopted a four-part test for deciding whether to grant an application to intervene pursuant to

1 Rule 24(a) :

2 (1) the applicant's motion must be timely; (2)
3 the applicant must assert an interest relating to
4 the property or transaction which is the subject
5 of the action; (3) the applicant must be so
6 situated that without intervention the
7 disposition of the action may, as a practical
8 matter, impair * * * that interest; and (4) the
9 applicant's interest must be inadequately
10 represented by the other parties.
11 Sagebrush Rebellion, Inc v Watt, 713 F2d 525, 527
12 (9th Cir 1983) (emphasis added).

13 Assuming arguendo that Kuimelis' application to intervene is
14 timely, Kuimelis application fails the second and third Sagebrush
15 prongs.

16 First, VHA's "interest" in the proposed derivative suit
17 is not related to the property or transaction which is the subject
18 of the FAC. In the FAC, VHA (along with other property owners)
19 claim that Kuimelis allegedly overcharged them. The property which
20 is the subject of this action is the overcharged amount and the
21 transaction at issue is Kuimelis' alleged overcharging.

22 Accordingly, VHA's interest in the FAC is the return of the
23 difference between the actual insurance premium amount and the
24 overcharged amount.

25 In the proposed derivative suit, however, Kuimelis wants
26 VHA to sue EBMC for allegedly converting premium returns and
27 surcharges in its capacity as a property manager and a general
28 partner of VHA. Thus, the property at issue in the proposed
derivative suit is money that EBMC (not Kuimelis) allegedly
converted. The transaction at issue is EBMC's failure to return
such monies to VHA.

Accordingly, the interest, property and transaction at

1 issue in the proposed derivative suit are not related to the
2 property or transaction at issue in the FAC. In essence, Kuimelis
3 seeks to introduce an entirely new and unrelated action that could
4 be litigated in some other suit. This is not the purpose of Rule
5 24. Rather, Rule 24 would allow Kuimelis to intervene if he did
6 not believe VHA's interest in retrieving the overcharges allegedly
7 charged by Kuimelis were not being adequately represented, as such
8 a retrieval is the point of the FAC. Kuimelis, however, does not
9 make such an argument; indeed, Kuimelis appears to contend that
10 those interests are being represented too well (i e, VHA should not
11 be suing him for reimbursement at all).

12 Kuimelis also fails to demonstrate how VHA's interest in
13 bringing suit against EBMC will be impaired if Kuimelis is not
14 allowed to intervene. Rather, Kuimelis explains the egregiousness
15 of EBMC's alleged conversion and then jumps to the conclusion that
16 VHA's interest "will be foreclosed if he is not allowed to
17 intervene." Doc #345 at 15. Kuimelis misunderstands the third
18 Sagebrush prong. VHA's interest is not impaired simply because
19 Kuimelis will have to file a separate derivative suit. To meet the
20 third Sagebrush prong, Kuimelis is required to demonstrate that
21 disposition of the current action will (1) prevent a future
22 derivative suit on behalf of VHA against EBMC or (2) create a
23 diminution in strength, value or quality of the derivative suit.
24 Kuimelis does not address either of these scenarios. In other
25 words, it is not a "now or never" situation for Kuimelis' proposed
26 derivative suit against EBMC.

27 Kuimelis' motion to intervene is accordingly DENIED.

28 //

V

Motion to Disqualify

Next, Kuimelis has filed a motion to disqualify Daniel Beck ("Beck") as counsel for EBMC and 69 of the property owners, including VHA. Doc #346. The motion to disqualify is deeply intertwined with the motion to intervene discussed above. Kuimelis argues that Beck, who represents both VHA and EBMC, should be disqualified because he has not brought suit on behalf of VHA against EBMC for conversion (i e, the suit Kuimelis seeks to bring through his intervention).

The argument goes as follows: Beck represents EBMC and 69 property owners in the suit against Kuimelis to retrieve the alleged premium overcharges. Beck's representation, however, presents an actual conflict of interest because the 69 property owners, and in particular VHA, have causes of action against EBMC for allegedly converting money (i e, the premium returns and surcharges). Beck, according to Kuimelis, has failed to provide his undivided loyalty to the 69 property owners by failing to pursue any claims against EBMC on their behalf. Id at 2. In essence, Kuimelis claims that Beck is putting the interests of EBMC ahead of the property owners' interests. To be clear, Kuimelis is seeking to disqualify Beck from representing any of the 69 property owners; not just VHA.

Additionally, Kuimelis argues that Beck must be disqualified because he is a percipient witness in this action; Beck must testify regarding material issues related to Kuimelis' affirmative defense of statute of limitations as well as alleged conversations between Beck and Kuimelis during the HUD

1 investigation. Id at 2. Neither argument is persuasive.

3 A

4 *Conflict of Interest*

5 The parties agree that Kuimelis, as a limited partner,
6 has standing to raise the actual conflict issue on behalf of VHA.
7 EBMC argues, however, that Kuimelis lacks standing to raise any
8 issues regarding conflicts of interest on behalf of the remaining
9 68 property owners. Kuimelis counters that, although he is a "non-
10 client" with respect to the remaining 68 property owners, "courts
11 have recognized that a non-client has standing to bring a motion
12 [to disqualify] where * * * the attorney's breach so infects the
13 litigation that it impacts that moving parties' interests." Doc
14 #407 at 10 (citing Colyer v Smith, 50 F Supp 2d 966, 971 (CD Cal
15 1999) and Decaview Distribution Co, Inc v Decaview Asia Corp, 2000
16 US Dist LEXIS 16534 (ND Cal 2000)). Regarding the 68 non-moving
17 property owners, Kuimelis states that "Beck's conflict is pervasive
18 and infects this litigation to an extent that impacts Kuimelis'
19 interest." Id.

20 Assuming that such third-party standing exists as a legal
21 proposition, the court concludes that Kuimelis, as a limited
22 partner in VHA, has failed to demonstrate that he has such
23 standing. Kuimelis simply makes the conclusory assertion that
24 Beck's alleged pervasive breach will "impact Kuimelis' interest."
25 This conclusory statement, however, is unsupported. Assuming
26 Kuimelis succeeds in disqualifying Beck from representing VHA and a
27 new VHA lawyer brings suit against EBMC for the alleged conversion,
28 Kuimelis has failed to demonstrate how his interest would be

1 affected by Beck's continued representation of the remaining 68
2 plaintiffs. To be sure, Kuimelis goes on at quite some length
3 regarding Beck's alleged wicked motive and desire to prevent these
4 68 property owners from recovering converted funds from EBMC. But
5 again, Kuimelis fails to show how this has a sufficient impact on
6 his interest so as to confer third-party standing upon him.

7 Moreover, as discussed below, the evidence offered by Kuimelis to
8 "prove" that an actual conflict even exists in Beck's dual
9 representation of EBMC and the property owners is quite thin.

10 As mentioned above the parties concede that Kuimelis has
11 standing to raise any conflict of interests arising from Beck's
12 dual representation of EBMC and VHA. This motion is not like an
13 ordinary motion to disqualify which is based upon a lawyer's former
14 representation of a client versus his present representation of a
15 client. Usually, the existence of a potential or actual conflict
16 is clear, as the lawyer either did or did not represent a client.
17 The inquiry in these cases ordinarily proceeds to other issues such
18 as possession and disclosure of confidential information or whether
19 a valid waiver of conflicts has been obtained.

20 In this case, however, the existence of a conflict is
21 hotly disputed. Kuimelis claims that EBMC converted funds from VHA
22 and thus VHA has a cause of action against EBMC, thus giving rise
23 to the alleged conflict in Beck's dual representation on EBMC and
24 VHA. Beck and EBMC, however, vehemently deny that EBMC converted
25 funds from the property owners and thus argue that VHA has no cause
26 of action against EBMC, thus alleviating any concerns about Beck's
27 dual representation. In other words, Kuimelis is moving to
28 disqualify Beck from representing VHA based upon VHA's right to sue

1 EBMC for conversion -- a right that only Kuimelis claims exists.

2 Whether to disqualify counsel is a decision committed to
3 the discretion of the district court. Gas-A-Tron of Arizona v
4 Union Oil Co of California, 534 F2d 1322, 1325 (9th Cir 1976).

5 "Because disqualification is a drastic measure, it is generally
6 disfavored and should only be imposed when absolutely necessary."

7 Concat LP v Unilever PLC, 350 F Supp 2d 796, 814 (ND Cal 2004)

8 (Illston, J). As the party seeking disqualification, Kuimelis
9 bears the burden of proving that disqualification is absolutely
10 necessary. Id. "A motion to disqualify should be accompanied by

11 declarations and admissible evidence sufficient to establish the
12 factual predicate upon which the motion depends." Colyer, 50 F

13 Supp 2d at 967. Finally, "[b]ecause a motion to disqualify is
14 often tactically motivated and can be disruptive to the litigation
15 process, * * *[it] is generally disfavored." Concat, 350 F Supp 2d

16 at 814. Applying these legal principles to the present motion, the
17 court concludes that Kuimelis has failed to come forward with
18 sufficient evidence to establish that an actual conflict exists and
19 thus he has not carried his burden of showing that disqualification
20 is absolutely necessary.

21 Kuimelis claims that an actual conflict exists in Beck's
22 representation of EBMC and VHA because "EBMC's principal and agents
23 have admitted taking monies belonging to the [p]roperty [o]wners."
24 Doc #346 at 5. First, Kuimelis states that EBMC illegally kept
25 California worker's compensation premium returns that were supposed
26 to be distributed to the property owners. Id. The only evidence
27 offered by Kuimelis to support this allegation is the deposition
28 testimony of Maureen Stroub (an EBMC agent). Doc #358 (Pav Decl),

1 Ex B (Stroub Depo) .

2 After reading Stroub's deposition, however, the court
3 disagrees with Kuimelis' assertion that EBMC has "conceded" that it
4 kept these insurance premium returns. Specifically, when Stroub
5 was asked whether there was "any effort * * * made by EBMC to try
6 to allocate the [insurance premium returns] to the specific
7 projects that had contributed to buying that Worker's Compensation
8 coverage," Stroub responded that she "wouldn't know about that."
9 Doc #358, Ex B at 155:22-156:3. When asked if she "even kn[e]w if
10 any effort was made to [allocate these return premiums] by
11 anybody," Stroub responded "I don't." Tr at 156:7-9. From this
12 testimony, Kuimelis informs the court that EBMC has conceded that
13 it did not distribute to VHA (or the other property owners) the
14 insurance premium returns to which they were entitled. This
15 grossly exaggerates Stroub's testimony. Stroub testified that she
16 "would not know" and "did not know" about any allocations of
17 premium returns by EBMC to the property owners. Stroub's lack of
18 knowledge, however, does not lead to the conclusion that no such
19 allocation ever occurred.

20 Next, Kuimelis claims that another EBMC agent, Kristi
21 Wells, has "acknowledged the existence of a covert surcharge" on
22 the property owners' worker's compensation premiums and that EBMC
23 converted the funds produced by this surcharge to its own use. Doc
24 #346 at 5. In her deposition, Wells states that "[t]here was a
25 period of time in which the rates were adjusted by 10 percent."
26 Doc #358, Ex A (Wells Depo) at 979:13-14. Wells states that "[i]t
27 was recommended by Mike Kuimelis that we add ten percent on the
28 payroll to help for anticipated increases that we were going to be

1 hit with * * *. [It was done] to assist the properties with the
2 potential increase that they were going to be having." Tr at
3 980:1-7. When asked what became of these "10 percent amounts,"
4 Wells stated that she did not know. When specifically asked if she
5 knew if these extra funds were indeed ever "used to assist with
6 anticipated premium increases," Wells again stated that she did not
7 know. Id at 8-16.

8 From this testimony, Kuimelis asserts that EBMC has
9 conceded that it (1) charged a 10 percent "covert" surcharge on all
10 premiums it charged the property owners and (2) converted this
11 extra money to EBMC's own use. Doc #346 at 5. Again, this
12 conclusion stretches Wells' testimony beyond recognition; there is
13 no discussion whether the property owners knew of this 10 percent
14 adjustment nor is there any indication that Wells knew what was
15 eventually done with the money produced from the surcharges.

16 Accordingly, the evidence offered by Kuimelis to prove
17 that VHA and the other 68 property owners have a cause of action
18 against EBMC is extremely thin and far from compelling. Moreover,
19 this evidence is the only evidence offered, apart from Kuimelis'
20 conclusory allegations of EBMC's dastardly acts and improper
21 motive. This evidence does not satisfy Kuimelis' burden of
22 demonstrating that the "drastic remedy" of disqualifying Beck from
23 representing VHA is "absolutely necessary."

24
25 B

26 *Beck as Witness*

27 Finally, Kuimelis argues that even if no conflict exists,
28 Beck's disqualification is "mandated by the fact that he is a

1 percipient witness to the events in this action." Doc #346 at 11.
2 First, Kuimelis claims that Beck will have to testify regarding
3 conversations between Beck, Kuimelis and Kuimelis' then-attorney
4 that occurred during the HUD investigation and prior to Burger's
5 indictment. Specifically, Kuimelis states that he showed Beck
6 drafts of letter responses to HUD inquiries and that Kuimelis spoke
7 with Beck concerning "Burger's state of mind with respect to the
8 charging of service fees." Doc #346 at 11. Next, Kuimelis claims
9 that Beck is a material witness to support Kuimelis' statute of
10 limitations defense against the 72 property owners' claims for
11 conversion. Id. Kuimelis does have standing to bring this motion,
12 as it "directly affects his access to evidence and the orderly
13 conduct of the trial of this action." Colyer, 50 F Supp 2d at 974.

14 The court will address the last argument first. Kuimelis
15 correctly states that the 72 property owners were not "named"
16 plaintiffs until the FAC was filed on December 1, 2003; the first
17 four amended complaints simply named Burger and EBMC and stated
18 that they were suing on behalf of the 72 property owners. EBMC
19 claimed it could sue on behalf of the property owners because EBMC
20 was either the general partner or property manager for each owner.
21 Kuimelis claims that because the property owners were not
22 explicitly "named" until December 1, 2003, all of their claims are
23 barred by the statute of limitations, which expired in May 2003.
24 According to Kuimelis, Beck will have to testify regarding these
25 "disputed" dates because, "as [the property owners'] purported
26 attorney, Beck's failure to name the [property owners] as parties
27 until after the statute of limitations ran on their claims may be
28 imputed to the client for statute of limitations purposes." Doc

1 #346 at 14.

2 Beck will not need to testify regarding Kuimelis' alleged
3 statute of limitations defense, for the court has already decided -
4 - as a matter of law -- that the substitution of the property
5 owners in the FAC relates back to the filing of the initial
6 complaint. See Doc #361 (6/1/04 Order) at 11 ("The court concludes
7 under FRCP 15(c)(3) that the claims of the [property owners] relate
8 back to the filing of the original complaint.").

9 Finally, Kuimelis claims that Beck will have to testify
10 regarding alleged conversations between Beck, Kuimelis and
11 Kuimelis' previous counsel that occurred prior to the filing of
12 this lawsuit. It is clear, however, that Kuimelis has waived his
13 right to object to this potential witness conflict. "It is well-
14 settled that a [party] who is entitled to object to an attorney
15 representing an opposing party * * * but who knowingly refrains
16 from asserting it promptly is deemed to have waived that right."
17 Trust Corp of Montana v Piper Aircraft Corp, 701 F2d 85, 87 (9th
18 Cir 1983) (citation omitted).

19 Kuimelis himself rings the death knell on this
20 disqualification ground by stating that "Beck will be a material
21 witness at trial [and] [h]e has been on notice of this possibility
22 since his discussions with Kuimelis during the HUD investigation
23 leading up to Burger's indictment" in 1999. Doc #346 at 11
24 (emphasis added). While this statement was no doubt offered to
25 support Kuimelis' disqualification argument, the statement cuts
26 both ways; if Beck has been on notice of this potential conflict
27 since 1999, then so was Kuimelis when this action was first filed
28 in state court in 1999 and removed to this court in 2002.

1 that:

2 [d]ue to inadvertence and innocent mistake, [Beck]
3 failed to apprehend this transfer of interest [and]
4 erroneously believed that EBMC remained the
5 managing partner of Apollo. Acting in accordance
6 with this misconception, counsel for EBMC named
7 Apollo as a party to this suit without the
8 authorization of Mr Bruner * * *.
9 Doc #436 at 3.

10 Kuimelis argues that the court should not drop Apollo.
11 Specifically, he claims that in his forthcoming motion for summary
12 judgment, he intends to argue for the disposition of the FAC based
13 upon, among other things, EBMC and Beck's "failure to secure
14 ratification of the lawsuit by the [property owners] after full
15 disclosure of the controversies surrounding this litigation before
16 joining them as parties pursuant to Rule 17(a)." Doc #440 at 5.
17 Kuimelis plans to use the misjoinder of Apollo as evidence that
18 Beck "unilaterally added the [property owners] without their
19 knowledge or consent." Id at 7. Dropping Apollo would, according
20 to Kuimelis, allow Beck and EBMC "to moot the blatant misconduct he
21 has proven EBMC and Beck have engaged in during this litigation."
22 Id at 8.

23 To force Bruner to remain in this lawsuit is unwarranted
24 under these circumstances. The court GRANTS the motion to drop
25 Apollo as a plaintiff in the FAC.

26 VII

27 In sum, the court DENIES the Burger parties' motion to
28 dismiss the SACC (Doc #410) and STRIKES ¶¶ 93, 99 and 105 inasmuch
as they allege injury to Kuimelis' business reputation. The court
GRANTS the Burger parties' motion for a more definite statement

1 regarding the SACC's eleventh cause of action (Doc #410), Kuimelis
2 must serve and file a more definite statement not later than May
3 23, 2005. The court DENIES the Burger parties' motion to dismiss
4 the ACC and DENIES the motion for a more definite statement (Doc
5 #412).

6 The court DENIES Kuimelis' motion to intervene (Doc #345)
7 and DENIES his motion to disqualify Beck (Doc #346). Finally, the
8 court GRANTS the Burger parties' motion to drop Apollo (Doc #436).

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10 IT IS SO ORDERED.

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13 VAUGHN R WALKER

14 United States District Chief Judge
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